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09/824,454	04/02/2001	Jonathan Paul Brennan	8047	9506

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EXAMINER

SPERTY, ARDEN B

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

Application Number: 09/824,454

Filing Date: April 02, 2001

Appellant(s): BRENNAN, JONATHAN PAUL

**MAILED**

JAN 30 2006

**GROUP 1700**

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Eric Addington  
For Appellant

**EXAMINER'S ANSWER**

This is in response to the appeal brief filed 11/07/05 appealing from the Office action  
mailed 6/03/05.

**(1) Real Party in Interest**

A statement identifying by name the real party in interest is contained in the brief.

**(2) Related Appeals and Interferences**

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

**(3) Status of Claims**

The statement of the status of claims contained in the brief is correct.

**(4) Status of Amendments After Final**

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) Summary of Claimed Subject Matter**

The summary of claimed subject matter contained in the brief is correct.

**(6) Grounds of Rejection to be Reviewed on Appeal**

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

**(7) Claims Appendix**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(8) Evidence Relied Upon**

**(9) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claim Rejections - 35 USC § 102(b):

Claims 1-2 and 8 are rejected under 35 U.S.C. 102(b) as being anticipated by Cohen (5505719).

The Cohen reference teaches outer layers, and the second and third layers, in combination, are analogous to the inner layer claimed by Applicant. In other words, the second and third layers are essentially sublayers that in combination are equivalent to the claimed inner layer.

Specifically, the reference teaches a first layer (first outer layer) comprising synthetic bicomponent fibers and natural fibers (col 5, line 54- col 6, line12). The synthetic fibers are contained in an amount of 10-100 wt%. The natural fibers are contained in an amount of 0-90 wt%. The disclosed ranges encompass the claimed ranges. The second and third layers, in combination, are analogous to the inner layer claimed by Applicant. In other words, the second and third layers are essentially sublayers that in combination are equivalent to the claimed inner layer. The second and third layers comprise 10-100 wt% synthetic fibers and 0-90 wt% natural fibers. The synthetic and natural fibers are selected from the same fibers as those of the first layer (col 6, line 29- col 7, line 30). The fourth layer corresponds to Applicant's claimed outer layer, and comprises 10-100 wt% synthetic fibers and 0-90 wt% natural fibers. The synthetic and natural fibers are selected from the same fibers as those of the first layer (col 7, line 51- col 8, line 7).

The reference teaches the card-and-bind (carded) method for making the nonwoven layers (col 8, lines 49-58). Carding is further discussed at col 9, lines 22-27.

The reference further teaches embossing along edges and in a random pattern across the web (col 9, lines 34-36) (discrete bond sites, without adhesive).

Claim Rejections - 35 USC § 103(a):

Claims 3-5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cohen (5505719), as applied to claim 1 above.

While the Cohen reference is not concerned with the ratios of claims 3-5, the invention is used in the same capacity as the claimed invention (as an absorbent composite) and is made of the same materials. The reference also recites optimizable thicknesses of each layer (col 6, line 22-28, 59-64; col 7, lines 43-50; col 8, lines 19-26) and cites density values (col 8, lines 62-col 9, line 22; Examples 1 and 2). In view of these teachings, it would therefore be obvious to one of ordinary skill in the art to optimize the claimed properties. Absent a showing of criticality with respect to the claimed values, no patentable distinction is seen between the claimed values and those common and useful in the art.

**(10) Response to Argument**

First regarding the 35 USC 102(b) rejection of claims 1-2 and 8 as being anticipated by Cohen:

Applicant's first position is stated on page 3 of the Appeal Brief, "Cohen does not teach or suggest each and every element recited in Claim 1." However, the arguments presented on page 4 are moot because they are not congruent with the rejection. The Office's position in the Final rejection, and as stated above in this Examiner's Answer, is that the combination of Cohen's second and third layers is analogous to Applicant's inner layer. Applicant incorrectly restates the Office's position on page 4, lines 3-8, of the Appeal Brief. The arguments are therefore moot, because they are not directed toward the rejection being appealed.

Secondly, Applicant asserts on page 4, "The Office misconstrues Cohen as teaching sublayers that may be combined to anticipate Claim 1." Applicant argues that the combination of Cohen's second and third layers cannot be construed as analogous to the claimed inner layer because they are recited by Cohen as having different pore sizes. The examiner submits that pore size is irrelevant to the interpretation of 'inner' and 'outer.' The present impasse raises a question of semantics. The Office's position is that 'inner' layer(s) are any and all layers between 'outer' layers. Cohen's second and third layers, in combination, are analogous to Applicant's claimed inner layer, because they are inner relative to opposing outer layers. 'Inner' is a relative term, as is 'outer.' The second and third layers, in combination, are 'inner' relative to more external or

'outer' layers. Regardless of the pore size of each of the second and third layers, they are still 'inner' relative to the more external, or 'outer', layers.

In further arguments, it is noted that Applicant misquotes the Final rejection in the second full paragraph of Appeal Brief Page 5. The position in the Final office action (page 3, line 4) is "...the 'comprising' language of the claim does not exclude a multilayer inner layer." (emphasis added). In the same paragraph of Appeal Brief Page 5, Applicant says it is irrelevant that the claim language is open-ended. The examiner disagrees, because the preambular "multilayer" structure, encompasses structures with more than three layers. The broadest interpretation of "multilayer," combined with the open-ended "comprising," and the relative terms "inner" and "outer," indicates that the claim is not limited to the claimed three layers a), b), and c). The open-ended language is relevant, because it is due to the open-ended language that Applicant's claim language does not preclude the Office's interpretation.

Applicant did not rebut the prior art rejection of claim 8 in response to any of the first non-final office action, second non-final office action, or final rejection. Applicant now chooses to rebut claim 8 by saying the Office has yet to point out a passage teaching a web formed without adhesive. Firstly, applicant is claiming something that is not present in the final product, thus it follows that a reference teaching the final product will lack a teaching of adhesive. Secondly, this is the first time Applicant has requested indication of a specific passage teaching "a web formed without adhesive." Lastly, Applicant has yet to point out a passage where Cohen does use adhesive. In order for Cohen to fail to teach the claim, Cohen would have to teach the use of an adhesive. A

text search, for adhes-, adhesi- or adhesive, did not find reference to an adhesive in the Cohen reference.

Secondly, regarding the 35 USC 103(a) rejection of claims 3-5 as being unpatentable over Cohen:

Appeal Brief Page 6 alleges, "The Office has failed to apply the *Graham* factors to the rejection of Claims 3-5." Applicant does not presently contest the rationale, or substance, behind the Office's conclusion of obviousness; Applicant contests the formalities required by MPEP 2141 [R-3], I, regarding *Graham* vs. John Deere. Applicant first alleges that there is no determination of the differences between Cohen and Appellant's claims. The examiner disagrees; the difference has been previously stated. The difference between Cohen and Applicant's claims is Cohen's lack of concern regarding the specifically claimed values, as was set forth in the Final office action, and the second non-final office action. Applicant also alleges there does not appear to be a resolution as to the level of ordinary skill in the art. The examiner disagrees; the office actions have set forth that the prior art is "used in the same capacity as the claimed invention (as an absorbent composite)," thus one of ordinary skill in the art would be someone in this field. The examiner elaborates in the Final Office action, per Applicant's request,

Applicant's argument against the 35 USC 103(a) rejection of claims 3-5 is unpersuasive. One of ordinary skill in the art knows how to optimize basis weights. Optimizing the basis weights is further motivated by the properties desired in a final product, and these properties vary on the ultimate intended use. The reference teaches various intended uses, i.e. column 1, lines 6-12, and it is understood by one of ordinary skill in the art



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that a diaper, for instance, may require different properties (absorbency, thickness, etc) than a feminine hygiene product. Even within the feminine hygiene art it is known to optimize properties based on whether the product is expected to absorb a large amount of fluid or a small amount of fluid. Applicant has not shown that the basis weights of the reference are any different from those recited by the claims, nor has Applicant shown unexpected results with the claimed basis weights.

Since Applicant does not contest the substance of the rejection or the conclusion of obviousness, affirmation or reversal of this particular rejection hinges on whether or not the examiner has properly established a *prima facie* case of obviousness. The examiner respectfully submits that the four Graham factors, and the three-pronged Graham test, have been properly applied.

Appeal Brief Page 6 further cites a second argument for invalidity of the 35 USC 103(a) rejection. Applicant relies on the dependency of claims 3-5 from claim 1, and thus on the ruling of the Board with respect to claim 1.

#### **(11) Related Proceeding(s) Appendix**

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.


Respectfully submitted,

Arden Sperty 

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